In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 792

HARRY E. WHITE,

Petitioner,

vs.

WM. F. STEER, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF ON BEHALF OF PETITIONER.

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Subject Index

Table of Authorities Cited

Cases

Statutes and Martial Law Orders

Miscellaneous

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OPINIONS BELOW.

The opinion of the United States district court for the Territory of Hawaii, before which this case was tried, is not printed but is found in the record at page 57.

The opinion of the Circuit Court of Appeals for the Ninth Circuit appears in the record at pages 706-751. It is reported in 146 Fed. (2) at page 576.

JURISDICTION.

Certiorari to review the decree of the Circuit Court of Appeals entered herein November 1, 1944 (R. 751) was granted by this court on February 12, 1945, upon a petition filed therefor December 29, 1944, and based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229 Sec. 1; 43 Stat. 938; 28 U.S.C.A. Sec. 347 (a).

THE QUESTIONS PRESENTED.

This proceeding in habeas corpus was brought to test the legality of the confinement of petitioner in Oahu Prison in Honolulu on a conviction by a provost court on August 25, 1942, for violation of Chapter 183, Revised Laws of Hawaii 1935, viz. embezzlement. Three questions are presented to this court.

The first question is whether the military courts set up in the Territory of Hawaii by a self-styled "Military Governor" had jurisdiction to try a civilian for a felony involving a violation of municipal law which had nothing to do with military operations or objectives, and deny him rights guaranteed under the 5th and 6th Amendments of the Constitution.

The second question is whether the privilege of the writ of habeas corpus was legally suspended on April 15, 1944.

The third question presented is whether the petitioner had a fair trial within the meaning of due process where, brought before the provost court, he

was forced to trial, without a reasonable opportunity to prepare his defense, and without being furnished a copy of the charge or accusation, and no record was kept of what he was told was the charge.

This case and *Ex Parte Duncan,* No. 791, were argued together in the Circuit Court of Appeals for the Ninth Circuit and a single opinion was rendered embracing both cases. Petitions for certiorari were filed in this court in both cases concurrently and granted on the same day. Certain facts and principles of law are common to both cases; but certain facts and principles of law are individual to this case and will be pointed out later and discussed. The brief in *Ex Parte Duncan* deals at length with the facts and principles of law common to both cases, and appellant adopts such parts of the brief in *Ex Parte Duncan* as are common to both cases.

STATEMENT OF THE CASE.

This proceeding was instituted by petitioner to secure his release from Oahu Penitentiary. He was a stockbroker in Honolulu. On August 20, 1942, he was arrested, accused of embezzling funds of a customer. In place of being indicted by the Grand Jury and tried before a jury in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, he was brought before a provost court presided over by a United

States Army officer, and there tried, convicted and sentenced to five years imprisonment (R. 16).

Provost courts and military commissions came into existence in Hawaii on December 8, 1941. On the preceding day—the day Pearl Harbor was attacked by the Japanese, and war was declared—Governor Joseph B. Poindexter had proclaimed martial law and suspended the privilege of the writ of habeas corpus. In doing this he proceeded under the authority of Section 67 of the Organic Act (31 Stat. 153; 48 U.S.C. 532). The material portion of this section reads:

> "The Governor . . . may . . . in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the territory or any part thereof under marital law until communication can be had with the President and his decision thereon made known."

In the same proclamation (R. 75) the Governor went farther and took a step unprecedented and beyond the language of the statute. (1) He delegated to the commanding general all powers normally exercised by the governor; (2) he delegated to the commanding general and his subordinates "the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require." (R. 75). Though the President was advised of the Governor's action in declaring martial law and suspending the privilege of the writ of

habeas corpus, the text of the proclamation was not furnished Washington until 1943 and it is doubtful if it was ever seen by President Roosevelt (R. 58).

On the same day General Walter C. Short issued a proclamation in which he advised that he would shortly publish "ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquor and other subjects."

He announced: ". . . Good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function." (R. 78).

General Short's first proclamation indicates it was his intention to administer martial law in the territory along orthodox lines. The "ordinances" which he forecast promulgating had a direct relation to the emergency; also he referred to holding defendants who were not dealt with by the military courts "in custody until such time as the civil courts are able to function" (R. 78).

Lieut.-Colonel Thomas H. Green, who became executive officer under the Military Governor, did not share such view. From the beginning (General Orders No. 4[1]—R. 556), he set up a military judicial system to punish civilian offenders as the provost courts saw

[1]See Appendix for text.

fit without regard to the limitations of the statute. Indeed, they acknowledged themselves bound by no law of the Territory, no act of Congress, no article of the Constitution. In 1942, 22,480 cases were handled by provost courts in the City and County of Honolulu alone (R. 467). In the month that petitioner was tried, the provost court disposed of 2,801 cases. All were convicted, except for sixteen against whom the charges were dropped for some reason not shown in the record (R. 476).

General Orders No. 4 began with this sentence: "By virtue of the power vested in me as Military Governor, the following policy governing the trial of civilians by Military Commissions and Provost Courts is announced for the information and guidance of all concerned." The Order then proceeded to state that these Military Commissions and Provost Courts would try "any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii, or the rules, regulations, orders or policies of the military authorities."

The order further declared that these "courts" would adjudge sentences commensurate with the offense committed. They were not bound by the penalties prescribed by law. Major offenses, the order provided, would be tried by Military Commissions which could "adjudge the death penalty in appropriate cases."

On December 8, 1941, acting under orders of the Commanding General, the Chief Justice posted a notice at the entrance of the judiciary building, an-

nouncing that the courts would be closed until further notice (R. 81).

Eight days later, however, on December 16, 1941, under General Orders No. 2[9], the courts reopened and never closed again (R. 82).

The Military Governor, however, at first restricted their operations to uncontested civil matters (R. 83). On January 27, 1942, he permitted the courts to dispose of civil causes "as agents of the Military Governor" but jury trials and habeas corpus proceedings were still prohibited (R. 86). With this exception, all other judicial functions in the Territory of Hawaii, including trial of criminal cases of every description (without regard to whether the offense was against federal or territorial law or violation of a military order or policy) were handled by provost courts and military commissions.

This situation continued until February 8, 1943. A short time before that, Ingram M. Stainback was appointed governor succeeding Joseph B. Poindexter (R. 48). The new governor found the Army unwilling to relinquish its hold on civilian affairs and in Washington the best he could do in inter-department conferences, without taking the issue to the President (R. 169 and 507), was a compromise under which the territorial government took back control of most of its normal operations and the courts were open for jury trials, civil and criminal; the provost court, however, remained in existence to enforce "orders or policies" of the Military Governor (R. 502). The Army insisted that the proclamation restoring civil

government should state that the privilege of the writ of habeas corpus remained suspended and martial law continued (R. 169).

The Army was reluctant to give up martial law and restore the writ of habeas corpus, not from fear of a Japanese invasion, but because it would end its iron grip on certain classes of labor (R. 170 and 156). Under General Orders No. 10 (R. 674), the Military Governor controlled all employes (a) of the war or navy department, (b) defense workers, (c) stevedores and other dock workers, and (d) public utility employes. An employe who failed to report for work was chargeable with "absenteeism" and punishable "by confinement, with or without hard labor, not to exceed two (2) months or by a fine not to exceed $200.00, or both such confinement or fine." In the month of February, 1944, in Honolulu 51 persons were brought before the provost court and charged with absenteeism (R. 517).

Though Japanese make up one-third of the population, there was no disorder or sabotage (R. 370). Almost 8,000 Japanese were employed on defense projects (R. 465).[1]

To be ready for the emergencies of war a special session of the Legislature in 1941 passed the Hawaii Defense Act (*Act 24 Sp. S.L. of Hawaii, approved October 9, 1941*) which gave the Governor great emergency powers—greater probably than the Governor

[1]17,600 Japanese-Americans have been inducted into the Army, Dillon S. Myer, director of war relocation authority, reported March 27, 1945.

of any state possesses (R. 141). General Walter C. Short praised the act highly, predicting it would do away with the necessity for martial law in event of war.[1] When war broke out December 7, the civilian government at least was prepared for it. The organizations created by civilians in anticipation of war came into immediate service (R. 140).

At the time appellant was arrested and tried the Territorial and Federal courts were wide open, fully staffed; their process unimpeded; there was no disorder (R. 129). The Chief Justice of the Supreme Court of Hawaii testified that after the month of April, 1942, he knew of no sound reason for denial of trial by jury to civilians charged with criminal offenses in Hawaii (R. 53). The Governor of the Territory testified that the trial of civilians before military courts for offenses against the laws of the Territory was unnecessary and unjustified by the conditions which existed in the Territory at said time petitioner was charged (R. 49). The Senior Judge of the Circuit Court, a court of record, testified to same effect (R. 128).

When petitioner was brought before the provost court he immediately filed a plea to the jurisdiction (R. 6 and 10), which was denied. He demanded a trial by jury (R. 6 and 11), which was also denied. He then filed a motion for a continuance for time to prepare his defense and advise with counsel. He also showed that his counsel was suffering from an arm injury and under daily treatment from a doctor. He

[1]Minutes Senate Committee of the Whole, September 17, 1941.

said that his defense required study of complicated bookkeeping entries and that he needed additional time to go over these entries with his counsel. The motion was overruled and he was forced to trial (R. 26). Respondent admits this (R. 26). It was also shown and admitted that petitioner was never given a copy of the charge or accusation against him. It was claimed he was orally told of the charge (R. 25). What he was told was not shown, for no record of it was kept.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the Provost Court, a military tribunal set up in Honolulu by the Commanding General of the department, had judicial power to try and sentence appellant, a civilian, in no way connected with the Army, for violation of Chapter 255, Revised Laws of Hawaii, 1945, viz. embezzlement.

This question was presented below (Pet. for Writ p. 7). The decision of the United States district court specifically held that the military court possessed no judicial power to try and sentence petitioner for an offense against local or domestic law. The Circuit Court of Appeals held that the military court did have such judicial power.

2. The Circuit Court of Appeals erred in holding and deciding that the privilege of the writ of habeas corpus was legally suspended when this proceeding was begun April 15, 1944.

This question was also presented below (Pet. for Writ p. 8). The United States district court held and decided that the privilege of the writ of habeas corpus was not legally suspended when this proceeding began. Circuit Judge Healy, in writing the opinion for the court, did not agree with this conclusion, but held it was not "essential to inquire into the applicability of the suspension" in the case at bar (R. 711). Circuit Judge Wilbur, in a concurring opinion, held that the privilege of the writ was suspended (R. 729).

3. The Circuit Court of Appeals erred in concluding (R. 727) that there was nothing in the showing made in the trial court to entitle appellant to relief on grounds relating to fair trial. Appellant was not furnished with a copy of the charge or accusation and was forced to trial without a reasonable opportunity to prepare his defense.

This question was presented below (Pet. for Writ p. 7). The trial judge, in view of his conclusion that the military court had no jurisdiction over petitioner, found it unnecessary to pass on this question. The Circuit Court of Appeals referred to it, saying there is nothing in the showing made which would warrant relief on the ground of the fairness of the trial in the provost court (R. 727).

SUMMARY OF ARGUMENT.

POINT ONE: *The Circuit Court of Appeals erred in holding that the provost court had jurisdiction over the person and subject matter when petitioner was tried before it August 25, 1942, for the crime of embezzlement.*

(a) The courts of the Territory being open and fully staffed, their process unimpeded, the Army was without right or authority to try petitioner for a violation of municipal law, viz. embezzlement, and to deny him a trial before a jury in an ordained and established court.

(b) All judicial power, properly speaking, is vested by the Constitution in such courts as Congress may from time to time ordain and establish, and Congress placed all judicial power in the enforcement of territorial laws in the Supreme Court and Circuit Courts of the Territory (48 U.S.C.A. 631), and no military court in Hawaii possessed any of such power.

POINT TWO: *When this case began February 15, 1944, the privilege of the writ of habeas corpus was not suspended. An agreement between government officers in settling administrative differences that the writ should remain suspended, is not binding on petitioner or the court where the constitutional basis for suspension does not exist.*

(a) Error was committed by the Circuit Court of Appeals in holding that at the time this proceeding began the writ of habeas corpus was legally suspended, where there was no invasion

and necessity for suspension was not actual and present.

POINT THREE: *Petitioner in his trial before the military court in Honolulu was denied rights deemed essential under the due process clause of the Constitution.*

(a) Petitioner was deprived of a fair hearing before the provost court, where with undue haste and before he could prepare his defense he was forced to trial, without being furnished with a copy of the charge, merely told orally what he was charged with; no record however being preserved of what he was told.

ARGUMENT.

POINT ONE.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE PROVOST COURT HAD JURISDICTION OVER THE PERSON AND SUBJECT MATTER WHEN PETITIONER WAS TRIED BEFORE IT AUGUST 25, 1942, FOR THE CRIME OF EMBEZZLEMENT.

The primary question here is whether in time of war the Army may take over the trial of civilians for offenses against local law. The question has already been answered in the negative by this court in *Ex Parte Milligan,* 4 Wall. 2, and at least indirectly answered in the recent case of *Ex Parte Quirin,* 317 U.S. 1. See also *Sterling v. Constantin,* 287 U.S. 378. But the Circuit Court of Appeals held that the Army's provost court had a legal right to try and sen-

tence petitioner for embezzlement and reversed the decision of the trial court, after declaring Hawaii was "under exclusive military rule" (R. 713) and had "nothing less than total military government" (R. 712-713). It is thus obvious that the Circuit Court of Appeals considered Hawaii in the same class as a conquered territory. The Army did likewise when the Commanding General assumed the title of Military Governor, with powers to match (R. 172).

It was an injustice to treat Hawaii as a conquered territory. The conduct of the population, quoting the Governor, had been admirable from every point of view and the civil population on December 7 and subsequent thereto "gave a wonderful account of itself" (R. 140).

Hawaii, it will be recalled, did not come into the Union by conquest or purchase. As an independent republic she threw in her lot with her great neighbor, whose form of government and principles she held in esteem and emulated. And when the sudden attack came on Pearl Harbor December 7, she did not fail in her duty. The civil population joined together, united against an enemy.

The basic distinction between martial law and military rule is that the former relates to control of a situation on domestic soil, and latter on foreign.[1]

It is submitted that at the time petitioner was tried the courts of the Territory were wide open, fully

[1]Wiener, A Practical Manual of Martial Law (1940).
Dowell, Military Aid to Civil Power (1925).

staffed and their process unimpeded. There was no invasion by the enemy and no disorder.

What is it appellee claims? That where the enemy strikes a blow at some military objective in the United States, the State or Territory in which such blow falls may at once be subjected to total military government or rule, not for days or weeks, but for years, vanquishing all rights of the individual under the Constitution.

It cannot be argued that the Territory of Hawaii is in any different position constitutionally speaking than a State. For Hawaii is directly under the Constitution. 31 *Stat.* (1900) 141, 48 *U.S.C.* (1940) 491; *Rasmussen v. U.S.* (1905) 197 U.S. 516, 535; *O'Donoghue v. U.S.*, 289 U.S. 516.

The Constitution provides:

> ". . . the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish." (Art. 3 Sec. 1).

When the Territory of Hawaii was organized, the Organic Act passed by Congress paraphrased this provision of the Constitution by providing:

> "The judicial power of the Territory shall be vested in one Supreme Court and Circuit Courts and such inferior courts as the legislature may from time to time establish." (48 U.S.C.A. 631).

The judicial power to try and punish petitioner for the crime of embezzlement was vested by Con-

gress in the Circuit Court of the Territory. The judges thereof are appointed by the President.

The Governor of the Territory under Section 67 of the Organic Act possessed no power whatever to delegate this judicial power to the Commanding General and no other provision of law gave him such authority. Such authority would be inconsistent with our democratic pattern of government.

Said this court in the *Milligan* case:

> "Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly, no part of the judicial power of the country was conferred on them, because the Constitution expressly vests it in 'one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify it in the name of the president, because he is controlled by law, and has his appropriate sphere of duties, which is to execute, not to make, the laws and there is no unwritten criminal code to which resort may be had as a source of jurisdiction." 4 Wall. 2.

The trial court was correct in saying:

> "The precise and only question is, Did the Governor of Hawaii have any judicial power to delegate? If not, the General's acts in reliance thereon were null and void and effected in the White case a denial of his rights under the Fifth and Sixth Amendments. Inferred Presidential approval would avail naught.

"To state the question is to answer it. No citation other than the Organic Act is necessary. Water cannot rise higher than its source. By that Act, in conformity with the nation's democratic pattern the government of Hawaii consists of three separate branches—the legislative, the executive, and the judicial—with neither at any time having the powers of the other two. That Act of Congress has been the law in Hawaii continuously and without interruption since 1900. Under it the Governor had no judicial power to give to the Commanding General on December 7, nor did the General need such in order to discharge his military duties.

"The record prompts the statement that on December 7, 1941, the Governor of Hawaii 'abdicated.' History will treat him more charitably." (R. 69-70).

The opinion of the Circuit Court of Appeals in reversing the trial court cited no case or authority to support its new concept of military power over civilians in time of war. The Circuit Court of Appeals cited no case or authority because there is none. It referred to *In Re Kalanianaole,* 10 Hawaii 29 (R. 717) and expressed the opinion that this case, which arose in the days of the Republic, in some way legalized military trials for civilians in Hawaii. The *Kalanianaole Case* is not in point. The defendant was a principal in a conspiracy to overthrow the government of the Republic under President Dole and the legislature passed a special enabling act to permit the trial of the conspirator before a military tribunal

This was five years before the Constitution of the United States was extended to Hawaii. Appellee does not claim any act of Congress conferred judicial power on the provost court that tried petitioner and, of course, no such claim could be made.

Ex Parte Milligan, 4 Wall. 2, has fully answered the question presented here. This decision has appropriately been called "one of the truly great documents of the American Constitution, a bulwark for the protection of the civil liberties of every American citizen."[1] Under either the majority or minority opinion in that case the trial of civilians before a military tribunal in Hawaii was unconstitutional.

The rule established by the majority opinion was that military trials for civilians is without sanction under the Constitution where the courts are open and their processes unimpeded. Manifestly under this rule the trial and punishment of White by a provost court was utterly illegal. And even under the rule suggested by the minority opinion the same conclusion must be reached, for the minority expresses the view that Congress has authority to authorize military tribunals when courts are open if insurrection is probable in the locality or the courts are stricken with disloyalty. In Hawaii there was never any question of insurrection, the conduct of the civil population has been "admirable from every standpoint" (R. 140). No one has even suggested that the courts,

[1] John P. Frank, Columbia Law Review, Vol. 14, No. 5, September 1944.

the judges of which are appointed by the President of the United States, are not completely loyal.

The minority opinion suggests Congress has authority under certain circumstances just indicated to authorize military tribunals to try and punish civilians, but it is worthy of note that Congress has never done so. And we believe Congress has never been asked to by a responsible branch of the Government; and certainly in the three years of martial law in the Islands neither the commanding general nor his department asked Congress for authority to administer punitive martial law there. Such a request, we submit, would have been futile. For the trial of civilians before a military court is repugnant to the fundamental traditions associated with the administration of justice in this country; and the history of Congress reflects an unwillingness to embark on such a revolutionary course.[1] Before the *Milligan Case* it was recognized that even in war the civilian was entitled to the benefit of the rights guaranteed him under the Constitution. When Andrew Jackson, as commanding general of the forces in Louisiana, in 1815 suspended the privilege of the writ of habeas corpus and put the entire civil population of New Orleans under martial law, he publicly announced that what he had done was "unknown to the Constitution and laws of the United States", and when the emergency was over and he was brought before court

[1] On March 21, 1942, Congress enacted a law for prosecution in *civil courts* of violators of general defense regulations. 56 Stat. 173 (1942), 18 U.S.C. Pr. 97(a) (Supp. 1943).

to be punished for what he had done, he paid the fine imposed upon him without complaining.[1]

Frequently cited and quoted from with approval, this court has never disavowed or modified the rule in the *Milligan Case.*[2] In both *Ex Parte Quirin,* 317 U.S. 1, and *Hirabayashi v. United States,* 320 U.S. 81, it was referred to and the problem presented in those cases distinguished from the situation in the *Milligan Case.*

How careful the makers of the Constitution were to assure an accused of a proper trial in a proper court and to the benefit of a jury to pass on the question of his guilt is apparent from the language of the great instrument:

> "The trial of all crimes, except in cases of impeachment, shall be by jury." *Art. III, Sec. 2.*

And again the 5th Amendment:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, nor

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[1] The True Andrew Jackson, by Cyrus Townsend Brady, p. 45. Life of Andrew Jackson, by John Spencer Bassett, pp. 227-228. *Johnson v. Duncan* (La.) 3 Martin Reports 530.

[2] In *Ex Parte Quirin,* 317 U.S. 1, the Solicitor General suggested the rule of the *Milligan Case* should be qualified.

be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

And the 6th Amendment continues:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for the witnesses in his favor, and to have the assistance of counsel for his defense."

The men who wrote these provisions in the Constitution knew the danger of unlimited and unregulated power and they did everything within their skill to see that the man accused of crime should have a trial surrounded by every possible safeguard of fairness. For when power in an officer is unlimited and unregulated, accusation is tantamount to conviction, and the innocent march with the guilty to prison cells.

The Constitution declares that the trial of all crimes shall be by jury. Two exceptions and two exceptions only were noted, impeachment and cases arising in the land or naval forces. The makers of the Constitution did not attempt to enumerate the different cases in which an accused should have a jury trial, but gave to all. No defendant may be de-

prived of such trial unless included in the exceptions. *Expressio unius est exclusio alterius.*

But it is claimed it was necessary to try petitioner before a military court. It was hysteria and not necessity. (Hysteria in the beginning and a labor freeze device later). Necessity had nothing to do with it, for the courts were open and ready to do business. When jurisdiction is usurped necessity or claim of necessity cannot invest the proceeding with validity; in every legal sense it is null and void. Had this been a proceeding to quiet title to land even respondent, we believe, would admit that the judgment would not be worth the paper it was written on. Necessity may be shown to reduce damages when the usurper is proceeded against by one whose rights he has invaded; but that is all.

No such claim was made in England to do away in war time with civil court trials. In London, despite her ordeal in the war and the nearness of the enemy and her resolve to "fight on the beaches, on landing ground, in fields, in the streets and in the hills,"[1] there was no martial law and the courts continued jury trials, civil and criminal.[2]

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[1]Winston Churchill, in radio address in spring, 1940, reprinted Time, January 6, 1941.

[2]Defense of the Real Act permits summary trial in civil courts of certain petty offenses involving war regulations. Shortage of available veniremen has caused juries to be reduced in many instances from 12 to 7.

POINT TWO.

WHEN THIS CASE BEGAN FEBRUARY 15, 1944, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS WAS NOT SUSPENDED. AN AGREEMENT BETWEEN GOVERNMENT OFFICERS IN SETTLING ADMINISTRATIVE DIFFERENCES THAT THE WRIT SHOULD REMAIN SUSPENDED, IS NOT BINDING ON PETITIONER OR THE COURT WHERE THE CONSTITUTIONAL BASIS FOR SUSPENSION DOES NOT EXIST.

As shown in the statement of facts *supra* the Army insisted on a form of modified martial law, as it was called, and continuance of the suspension of the privilege of the writ of habeas corpus, in connection with the proclamation of February 8, 1943, restoring civil government. This, in spite of the fact that all witnesses agreed, including Admiral Nimitz (R. 310) and General Richardson (R. 265), that there was not even a remote possibility of a Japanese invasion of Hawaii. It was conceded there had been no uprising in the Territory and that military force had never been called on to put down riots or mobs. At no time had civil authorities or courts been interfered with or their processes made impotent.

The necessary basis for the suspension of the privilege of the writ under the Constitution (Article 1, Sec. 9) not being present, respondent turned to Section 67 of the Hawaiian Organic Act (31 Stat. (1900) 153; 48 U.S.C. 532). The pertinent provisions of this section are:

> "The Governor . . . may . . . in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the

territory or any part thereof under martial law until communication can be had with the President and his decision thereon made known."

The Circuit Court of Appeals pointed out that this section was taken from the Constitution of the Republic of Hawaii. It will be noted it is different in an important particular from Article 1, Section 9 of the Federal Constitution. The difference is that while under the Constitution a person may not be deprived of the privilege of the writ except in cases of rebellion or invasion, under Section 67 he may be deprived of it not only when there is rebellion or invasion but when there is imminent danger of rebellion or invasion.

Section 67 therefore accounts for the attempt of respondent to show that though there was no invasion, there was imminent danger thereof. How well he fared may be shown from Admiral Nimitz's testimony. On the witness stand he was asked by respondent if in his opinion there was imminent danger of invasion by the Japanese. He answered: *"Invasion by sea-borne troops in sufficient number to seize a bridgehead, no. I consider it neither imminent nor probable."* Having in mind no doubt the entry of German spies and saboteurs by submarine on the Atlantic coast, he mentioned that "invasions" of that type are always possible (R. 310).

General Richardson, commanding officer of the department, agreed with Admiral Nimitz: ". . . We feel quite certain that the Japanese are totally incapable

of coming to these islands with a land-based force for the purpose of seizing and capturing it. We do not think that is within their capability at all. *The time for that is past.*" (R. 265). He realized, of course, as Admiral Nimitz did, that spies, saboteurs or commandos could possibly be landed.

Section 67 of the Organic Act cannot enlarge on the Constitutional limitation for suspending the privilege of the writ. Various states have their own provision dealing with suspension of the writ; they are not bound by the limitations of the Federal Constitution. *Gasquet v. Lapeyre,* 242 U.S. 367. But organized territories are. *O'Donoghue v. United States,* 289 U.S. 516; *Rasmussen v. United States,* 197 U.S. 516. The restraints and restrictions of the Constitution are in full force and effect in Hawaii. Section 5 of the Organic Act (48 U.S.C. 495) expressly extends the Constitution to Hawaii.

Section 5 had its beginning in the Joint Resolution of Annexation of July, 1898. When the Organic Act was introduced in Congress the report of the House committee states that though Section 1891, Revised Statutes, which applied to all territories, would have the effect of extending the Constitution to Hawaii, Section 5 had been included to make assurance double sure.[1]

The question of the application of the Constitution to Hawaii first came before this court in *Hawaii v. Mankichi,* 190 U.S. 197. The precise question was

[1] H.R. Rep. 305, 56 Congress, 1st Sess. (1900) 10.

whether the Constitution was extended to Hawaii by the Joint Resolution of Annexation of 1898 or by the Organic Act of 1900, the relevancy of the question relating to the requirement of grand juries and trial juries in criminal cases, during this two year interlude. The decision of the court, five to four, held that the Constitution was not extended to Hawaii, with respect to jury requirements, until 1900 when the Organic Act was passed. Justice White, in his concurring opinion, said that by the Organic Act "the Islands were undoubtedly made a part of the United States in the fullest sense." Later decisions of this court have left no doubt on that point. *Carter v. Gear*, 197 U.S. 348; *Rasmussen v. United States*, 197 U.S. 516.

Ex Parte Milligan, 4 Wall. 2, in 1866 declared the rule and fixed the standard for the suspension of the privilege of the writ under the Constitution, and Section 67 of the Organic Act passed in 1900 must be read in that light. Congress knew from that decision when and only when the privilege of the writ could be suspended. The Territory was brought directly under the Constitution, including Article 1, Section 9, and Section 67 is valid only to the extent it is not in conflict with Article 1, Section 9.

In *Ex Parte Milligan*, 4 Wall. 2, this court said: "On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effec-

tually closes the courts and deposes the civil authority."

Petitioner was not a party to the compromise agreement worked out by the Governor and the Army in Washington. The trial judge was not a party and he was free to make a judicial determination, as he did, on the question of whether the privilege of the writ was legally suspended.

While power is given the Governor in the first instance to determine if the privilege of the writ should be suspended, when thereafter one claiming unlawful imprisonment seeks the benefit of the writ, a judicial duty instantly devolves on the court to ascertain if conditions presently existing satisfy the constitutional *sine qua non* for its suspension. As it is the privilege of the writ and not the writ itself which is suspended, the court should issue the writ and make the inquiry on its return (*Ex Parte Milligan*, 4 Wall. 2).

Sterling v. Constantin, 287 U.S. 378, should furnish the full answer to the contention of Judge Wilbur, in his separate concurring opinion, that the suspension of the privilege of the writ of habeas corpus having been initiated by a proclamation will continue suspended indefinitely until restored by proclamation. This would exalt the proclamation over the Constitution, making it supreme. "If this extreme position could be deemed to be well taken, it is manifest that a fiat of a state Governor and not the Constitution of the United States would be the supreme law of the land." *Sterling v. Constantin, supra.* This decision

of the Supreme Court places the true value on the proclamation of the chief executive, makes it clear that neither action nor inaction on the part of the Governor with respect to martial law can do away with the background preeminently essential where the privilege of the Great Writ is to be withheld.

Suspension of the privilege of the writ under Article 1, Section 9 of the Constitution does not mean that it is unavailable in *all* cases.[1] Such suspension would not, for instance, bar a parent from recovering his infant wrongfully detained by an individual, or a sane person from seeking release from an insane asylum. The suspension covers all cases related to the affairs of the emergency and is a security measure intended for public safety.

POINT THREE.

PETITIONER IN HIS TRIAL BEFORE THE MILITARY COURT IN HONOLULU WAS DENIED RIGHTS DEEMED ESSENTIAL UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Petitioner was charged with embezzlement under Hawaiian law (Chapter 183, Revised Laws of Hawaii, 1935). This crime carries with it a ten year prison provision.

Petitioner was arrested on Thursday, August 20, 1942, and held in jail until Saturday, August 22, when at approximately 2 o'clock in the afternoon he was

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[1] *The People v. Gual*, 44 Barb. (1865) 98; 39 C.J.S. 794.

brought by an armed member of the Provost Marshal's office before Major Samuel E. Murrell, who was conducting the business of the provost court in the courtroom of the district magistrate (R. 5). Petitioner was told that he was to be tried for embezzlement, but he was never furnished with a copy of the charge or accusation (R. 6). Respondent claims he was orally told (R. 25) but what he was told we do not know for no record of it was kept.

Petitioner promptly entered a written plea to the jurisdiction of the provost court over him (R. 6 and 10), which was denied. He then demanded in writing a jury trial (R. 6 and 11), which was denied. He then moved for a continuance and supported it by affidavit (R. 6-7 and 12-13). This affidavit was made by his attorney, in which he said:

> ". . . that the charges in this case were filed Saturday, the 22nd day of August, 1942, and they involve the dealings of a stockbroker with his client, and the matters contained in said charge are kept by book entries from day to day in the business of the defendant. Further, your affiant has been informed by the police that they are investigating certain other transactions involving defendant in his business as a stockbroker. . . . That your affiant has practised law in the Territory of Hawaii for more than twenty years and has actively engaged in the practise of law in the Federal Courts and Territorial Courts and in military tribunals and that in his experience before Naval Courts, United States Courts and Territorial Courts he has never been obliged to go to trial within the short space of time which

has been allowed him in this particular case; and he verily believes and says that this defendant cannot safely go to trial without a more thorough and exhaustive study of the facts surrounding the alleged offense, and that the alleged crime is so peculiar in its nature and is so involved by reason of the bookkeeping and records of the defendant that he feels that the defendant should be allowed further time within which to prepare his defense in this case. Your affiant says that at the present time he is not in a position to properly advise his client on the merits of this particular case. . . .

"Further, your affiant says that he has been visiting the doctor every day for the past ten days on account of an injury received to his arm." (R. 12-13).

The motion for a continuance was denied and petitioner was forced to trial August 25 (R. 7), four days after what served as an arraignment (R. 7). He was convicted and immediately sentenced to imprisonment for five years and *mittimus* issued forthwith (R. 15-16).

Trials before the provost courts in Honolulu were not trials in the sense that they were fair inquiries to ascertain the guilt or innocence of an accused. In civil courts the burden is on the prosecution to prove the guilt of the accused beyond all reasonable doubt and to a moral certainty before the hand of the jailor may be put on him. In these provost courts, for all practical purposes, the rule was exactly the opposite and the accused went to trial prejudiced by an obli-

gation literally to prove his innocence. This is reflected not only in the official report of responsible officials but in the records of the provost courts themselves. For instance, in the month of August, 1942, when petitioner was arrested and tried, there were a total of 2,801 cases brought before the provost court. *Of these all were convicted but sixteen.* In the preceding month 3,295 cases were brought before the military court. *Only eighteen escaped.* In the month following petitioner's trial 1,252 were brought before the court. *Only six got off* (R. 467). How these fortunate few were able to prove their innocence beyond all reasonable doubt and to a moral certainty is not shown by the record. These figures give special point to the official report of the Attorney General of the Territory to the Governor of Hawaii made four months after petitioner's trial:

> "In place of the criminal courts of this Territory there have been erected on all the islands provost courts and military commissions for the trial of all manner of offenses from the smallest misdemeanor to crimes carrying the death penalty. Trials have been conducted without regard to whether or not the subject matter is in any manner related to the prosecution of the war. These military tribunals are manned largely by army officers without legal training. Those who may have had any training in the law seem to have forgotten all they ever knew about the subject.
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> "Lawyers who appear before these tribunals are frequently treated with contempt and suspicion. Many citizens appear without counsel; they know, generally speaking, that no matter what evidence

is produced the 'trial' will result in a conviction. An acquittal before these tribunals is a rare animal. Accordingly, in most cases a plea of guilty is entered in order to avoid the imposition of a more severe penalty. Those who have the temerity to enter a plea of not guilty are dealt with more severely for having chosen that course.

"The accused is not furnished with a copy of the charge against him but is permitted to examine the prosecutor's copy. Trials take place in crowded courtrooms in which the officers in charge are fully armed. The witnesses are brought before the provost judges en masse and stand in a circle about the bench together with the accused. The assemblage tells the judge their views of the matter. Cross-examination of witnesses is tolerated with none too much patience by the court.

"There have been instances in which arrests have been made and the accused kept in jail three or four days awaiting trial, even in the case of comparatively minor offenses. With the writ of habeas corpus suspended the unfortunate accused in such cases is without remedy.

"The 'military governor' has appointed what he styles a coordinator of courts. At the present time this is Captain Edward N. Sylva, who was formerly one of the deputies in this office. I am informed that as cases come in Mr. Sylva makes a determination whether or not they should be tried by the courts of the land or tried before the military tribunals. His determination is final.

"The proceedings in these military tribunals are not only shocking to a lawyer but to anyone with a sense of fair play. Severe and bizarre sentences

are meted out by persons untrained in the law. The feeling of the public is that they are guilty before they step inside the courtroom and their main problem is to escape with as light a sentence as possible.'"

It has always been the standard practise in Hawaii, in the courts of the Territory and the United States district court, to furnish accused with a copy of the charge or indictment and to give him a reasonable opportunity to prepare his defense. This practise conforms to the general practise prevailing throughout the United States, and is inextricably involved in those rights embraced in the fundamental concept of due process.

In *Chambers v. State of Florida*, 309 U.S. 227, this court interfered in a criminal case in a state court because confessions wrongfully obtained were used against defendant. The fundamental standards of procedure in a criminal prosecution must be observed, said this court. To furnish defendant with a copy of a written charge, that he may know precisely the charge and may demur or otherwise challenge its sufficiency, is also a fundamental standard of procedure. A trial conducted with such undue haste that accused is unable to prepare his defense is as much a violation of the fundamental standards of procedure as the use of a confession wrongfully obtained. In one case by the expedient of haste defendant is deprived of evidence and in the latter case, by the expedient of coer-

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[1] Columbia Law Review, Sept. 1944, VXLIV, No. 5, p. 652, contained in an able article by John P. Frank, "Martial Law in Hawaii".

cion, evidence is obtained against him. In neither case has he had a fair trial.

In whatever court a man is tried he must be dealt with "consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Herbert v. State of Louisiana,* 272 U.S. 312.

CONCLUSION.

It is submitted on behalf of petitioner that the denial to petitioner of a jury trial and a trial before an ordained and established court in the Territory was without authority of law and that the judgment of the Circuit Court of Appeals should be reversed and final judgment entered in favor of petitioner. Additionally, it is respectfully submitted that the trial and hearing given petitioner in the military court was arbitrary and unfair and on this ground also the judgment below should be reversed and petitioner discharged.

Dated, Honolulu, Hawaii,
September 5, 1945.

Respectfully submitted,
FRED PATTERSON,
Counsel for Petitioner.

HERBERT CHAMBERLIN,
EBERT J. BOTTS,
Of Counsel.

(Appendix Follows.)

Appendix

General Orders No. 4

7 December 1941

By virtue of the power vested in me as Military Governor, the following policy governing the trial of civilians by Military Commissions and Provost Courts is announced for the information and guidance of all concerned:

1. Military commissions and provost courts shall have power to try and determine any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authority. The jurisdiction thus given does not include the right to try commissioned or enlisted personnel of the United States Army and Navy. Such persons shall be turned over to their respective services for disposition.

2. Military commissions and provost courts will adjudge sentences commensurate with the offense committed. Ordinarily, the sentence will not exceed the limit of punishment prescribed for similar offenses by the laws of the United States or the Territory of Hawaii. However, the courts are not bound by the limits of punishment prescribed in said laws and in aggravated cases and in cases of repeated offenses the courts may adjudge an appropriate sentence.

3. The record of trial in cases before military commissions will be substantially similar to that required

in a special court martial. The record of trial in cases before provost courts will be substantially similar to that in the case of a Summary Court Martial.

4. The procedure in trials before military commissions and provost courts will follow, as far as it is applicable, the procedure required for Special and Summary Courts Martial respectively.

5. The records of trial in all cases will be forwarded to the Department Judge Advocate. The sentences adjudged by provost courts shall become effective immediately. The sentence adjudged by a military commission shall not become effective until it shall have been approved by the Military Governor.

6. All charges against civilian prisoners shall be preferred by the Department Provost Marshal or one of his assistants.

7. The Provost Marshal is responsible for the prompt trial of all civilian prisoners and for carrying out the sentence adjudged by the court.

8. Charges involving all major offenses shall be referred to a military commission for trial. Other cases of lesser degree shall be referred to provost courts. The maximum punishment which a provost court may adjudge is confinement for a period of 5 years, and a fine of not to exceed $5000.00. MILITARY COMMISSIONS MAY ADJUDGE PUNISHMENT COMMENSURATE WITH THE OFFENSE COMMITTED AND MAY ADJUDGE THE DEATH PENALTY IN APPROPRIATE CASES.

9. In adjudging sentences, provost courts and military commissions will be guided by, but not limited to the penalties authorized by the courts martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases.

THOMAS H. GREEN,
Lt. Col. J.A.G.D.
Executive Officer.